

DELTA BEVERAGES (PRIVATE) LIMITED
versus
PYVATE INVESTMENTS (PRIVATE) LIMITED
and
JOSEPH MUTANHO

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 9, 10 and 11 January 2018 & 14 March 2018

Continuous roll

P Chakanyuka, for the plaintiff
G Machingambi, for the defendants

DUBE J: The plaintiff issued summons against the defendants claiming US\$26 924.00 being monies due and payable to it in respect of beverages supplied on credit. The defendants filed a claim in reconvention in the sum of \$57 183.72 being a claim for discounts due and payable to them on purchases made from the plaintiff. The plaintiffs' claim was settled by consent of the parties at the pre-trial conference stage. What remains to be resolved is the claim in reconvention. For convenience, the defendants will be referred to as the plaintiffs in the claim in reconvention and the plaintiff in the main claim as the defendant.

The claim in reconvention is based on the following facts. The plaintiffs entered into a goods supply agreement wherein the defendant would supply beverages to the plaintiffs on credit for resale. The first plaintiff was represented by the second plaintiff. The plaintiffs claim is that they entered into a goods supply agreement which stipulated that the defendant would grant to them a 5% discount on all goods purchased and supplied in terms of clause 4.6 of the goods supply agreement. Contrary to this agreement, the defendant claims that the defendant unilaterally reduced the discount rate from 5% to 2, 6% resulting in the plaintiffs suffering prejudice in the sum claimed.

The defendant denies that any goods supply agreement was entered into entitling the plaintiffs to a 5 % discount.

The following issues were referred to trial:

- (a) whether the parties entered into a goods supply agreement on 1st November 2009 entitling the plaintiff to a 5% trade discount.
- (b) whether the defendant breached the agreement entitling the plaintiff to a claim for damages.

The plaintiffs opened their case by calling, Joseph Mutanho a director of the first plaintiff as a witness. His evidence is as follows. He entered into a verbal contract with a salesman of the defendant known as Maramba in 2009 to sell beverages on the defendant's behalf. The parties agreed orally that plaintiffs would get a 5% discount on all purchases and the parties traded on that basis. When they entered into the oral contract the defendant was in the process of preparing a written contract. The defendant's representative later gave him 3 copies of a written agreement to sign and he signed it on 1 November 2009 and forwarded it to the defendant. The terms of the written agreement are similar to those of the oral agreement. The defendant did not sign or return a copy of the signed agreement. The unsigned contract was valid and would expire on 1 November 2010. In the year 2012 the defendant unilaterally changed the discount from 5% to 2, 6% without the plaintiffs' consent. His period of complaint is from 29 March 2012 to April 2013 being the period over which the interest was reduced from 5 % to 2, 6%. The plaintiffs started making a loss after the reduction in discount rates. The plaintiffs' claim is reduced to \$43 369, 54.

The witness testified under cross-examination that he entered into a number of oral contracts with the defendant's sales representatives for a discount of 5% in 2009. He acknowledged the debt owed to the defendant on 19 November 2013 and agreed to pay what he owed the plaintiff when the plaintiff had already started denying him payment and knew that he was owed. He agreed with the plaintiff that he continue to be supplied goods pending the resolution of the dispute. The defendant gave his house as security for the plaintiffs to trade with Delta and registered bonds over the house during the period of the complaints concerning the discount. If he had not agreed to register the bonds, he would not have been able to trade with the defendant.

The witness did not impress as a truthful witness. He seemed to be developing his case as the trial progressed.

The defendant called its Credit Control Manager in support of its case. His testimony is as follows. The defendant gives discounts to everyone who comes to purchase. A discount or percentage is determined from time to time. The discount is reflected on the invoice.

Senior management decide the level of the discount. Some key customers get communication of the discount which is put in the system. Some customers get a discount whilst some don't at all. During the period between 2009 and 2011 some customers were given written contracts for discounts for a period of 12 months. When the plaintiff acknowledged his debt, he does not remember him mention anything about a discount. The plaintiffs got a discount of 2, 6 which was what was due to them. He denied that the plaintiff entered into a verbal or written contract for a discount of 5% with the defendant. The sales persons who go into the market do not have authority to enter into contracts. He does not know why the contract was not signed by the defendant. It means that the plaintiffs did not meet the criteria required which is that the customer must be capable of moving large volumes, has a surety bond to support trading credit and that he must be in a location that the company is interested in. The surety bond was meant to protect the credit. Initially the defendant's customers were given a 5% discount. The discount was varied to 2, 6% for all of the defendant's customers. The witness's version was clear and straightforward. He gave his evidence well.

It is common cause that the parties had a trade relationship between November 2009 and March 2013. The plaintiffs enjoyed a discount on its purchases. The issue is whether there was a 5% trade discount agreed to between the parties which the plaintiffs were entitled to. The plaintiffs maintained that the parties entered into a verbal agreement for a discount of 5% before the parties entered into a written agreement on the same terms. The plaintiffs state that inside the trade relationship were special agreements which they want respected. Their complaint is that the defendant varied the discount from 5% to 2.6% unilaterally. The defendant insisted that there were no oral agreements entered into with respect to the discount of 5%. The defendant contends that it was giving its customers a trade discount of 5% which it contends it did on its own. It then reduced the discount for all customers to 2.6%. The plaintiff's witness testified in his evidence in chief that he entered into a verbal agreement for 5% discount on all purchases with one Maramba. He did not seriously refute the defendant's assertion that the 5% discount was given to all of the defendant's customers and was reduced to 2.6% for all customers. Later in cross examination he told the court that there were several oral agreements for the discount of 5% entered into with different sales persons. The different sales persons were not named except one. The justification for a number of oral contracts was not shown especially if one has regard to the fact that the terms were the same and the oral contract was said to be valid for as long as the parties still traded. The terms of the various contracts were not given. The witness was not consistent in his evidence on the verbal

agreements. The witness' story developed as the trial progressed. The idea of the verbal agreements only emerged in court. The court has noted that this position was not specifically pleaded. The declaration only speaks to an agreement having been entered into to give the plaintiffs a discount. The suggestion that there oral agreements only surfaced in oral evidence. The impression created is that the oral agreements are an afterthought.

The evidence led does not disclose the full identity of the persons with whom the plaintiffs entered into these verbal contracts. Only a Mr Maramba was singled out as the person with whom the witness entered into one verbal contract. The defendant's evidence that the defendant's sales persons had no authority to enter into contracts for discounts went unchallenged. The court believed the defendant's witness when he said that the defendant was already giving the plaintiffs a discount of 5% out of its own initiative. Further, that the percentage was reduced to 2.6 % for all the customers. It is not clear which oral agreement the plaintiffs are relying on. The date when the oral agreement was entered into was not given.

The plaintiff's witness testified that he entered into a written contract for 5 % discount with the defendant on 1 November 2009. He conceded that the defendant did not sign its part of the contract. The defendant's witness did not deny that the defendant would enter into written contracts with its major customers. He did not dispute that the draft contract the second plaintiff signed was similar to the one used by the defendant at that time. He did not deny that the defendant had been given the draft contract. He testified that it was not automatic for a customer to enter into an agreement for discount. The customer was required to meet certain criteria after which a written agreement would be entered into. He insisted that the defendant did not enter into a contract with the plaintiffs. The evidence led discloses that the agreement for the discount was signed by the plaintiff's representative only.

Generally, oral contracts are enforceable and do give rise to valid contractual relationships. The oral contract, sometimes referred to as the invisible contract, is one of the most difficult to prove. What makes this so is the lack of hard evidence of the existence of the contract. The essentials of a verbal contract are the same as those of a written contract. There must be offer and acceptance of the contract, existence of consideration, the parties must have the capacity to enter into the contract and the parties must intent to enter into the contract and create a binding legal relationship. The courts will not endorse an oral agreement were any of the essential elements of a valid contract have not been proved. The terms of the oral contract must be proved and there must be agreement and understanding of the terms of the contract by the parties. An oral contract that meets all the requirements of a contract is binding on the

parties and gives rise to a legally enforceable relationship. There must be a meeting of the minds or a reasonable belief by the parties that there is consensus. A party who alleges the existence of an oral contract has the onus to prove the existence of the contract on a balance of probabilities.

In *South African Railways and Harbours v National Bank of South Africa* 1924 Ad 704 at 715, the court stated:

“The law does not concern itself with the working of the minds of the parties to a contract, but with the external manifestations of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement.”

A contract may be enforceable where there is evidence of the existence of the contract which may include evidence of performance of the contract and reliance on the agreement by the parties. There are cases where the contract itself has not been made perfecta by the signing of the agreement by the parties. Where the acts and conduct of the parties reveals that the minds of the parties have indeed met, the court will not hesitate to confirm the contract. A party alleging the existence of a contract in such circumstances must lead evidence to demonstrate the existence of the contract and the parties' understanding of the contract. Documentary evidence such as emails, faxes, showing the intention of the parties and dealings between the parties after the alleged contract was entered into serve to confirm the existence of the contract.

The terms of the different oral contracts were not proved. All the court was told was that there were oral agreements for a 5% discount? The plaintiffs witness says nothing about the other terms of the oral contracts. The duration of the contracts are not known. The plaintiffs' witness created confusion by introducing the subject of the several other oral contracts. The plaintiffs later seemed to want to rely on only one of the oral contracts. The plaintiff's witness asked in cross-examination how long the oral agreement with the salesman was to last and his response was that there was no date of termination but that the contract would last for as long as he was in business with and traded with the defendant. This is unrealistic. It means that there was need to replace it with a written contract was not shown. If the terms of the oral agreement were the same as those of the written contract, as the witness contends, it means that the oral agreement would have lapsed when the written

agreement came into place. The draft contract does not state that it replaces any oral contract. The need for more than one verbal contract was not shown.

The plaintiffs have failed to prove the terms and essential elements of the oral contract relied on and hence failed to prove the existence of any oral agreements entered into before November 2009. An oral contract that does not satisfy the essential elements of a contract does not constitute a valid contract and is not enforceable. The court is not convinced that there were any oral agreements in place before 1 November 2009.

No written agreement for discount was concluded by the parties. The fact that the defendant did not sign the contract shows clearly that the minds of that the parties were not *ad idem* that a contract be concluded. If the defendant had wanted to be bound by the contract, there would have been no reason for it to fail to return the draft contract. The plaintiffs did not show that they met all criteria for a written contract. What the evidence shows is that the plaintiffs were given different rates of discounts at different stages. The statements produced disclose that at some stage the plaintiffs were enjoying a discount of 5% which was later reduced to 2.6 %. The evidence of the defence witness that the discount enjoyed by the plaintiffs was at the discretion of the defendant, would vary from time to time and was not the subject of any contract is more probable. In the absence of a contract signed by both parties, the plaintiffs are required to show that there was performance of the contract and that the parties relied on the agreement. Evidence discloses that the plaintiffs enjoyed a 5% discount well before the written draft was signed by them. Once we accept that there was no verbal contract, it means that the discount enjoyed by the plaintiffs before 1 November 2009 was not subject of any contract. The discount they enjoyed after 1 November 2009 was clearly not subject to any contract but a continuation of the *status quo*. The fact that the plaintiffs were given a discount earlier on does not create a legally binding contract between the parties.

The written agreement, if concluded on 1 Nov 2009, would have been valid for only 12 months and would have expired on 1 November 2010. The plaintiffs' cause of action only arises on 29 March 2012. The written contract would have expired by then. The plaintiff's assertion that the verbal contracts were to last forever for as long as he was still buying beverages from the defendant is inconsistent with the fact that the unsigned draft covers a period of 12 months only. Even if it is accepted that the contract is valid, it is clear that neither party would have wanted to be bound for a period of more than 12 months. It cannot be assumed that the parties would renew the contract. The contract was not renewed. The

period of the claim falls well outside the 12 months covered by the written contract. There is no evidence of any dealings between the parties which shows that the parties' intention was to be bound by the unsigned contract.

The probabilities of the case favour the defendant's position that the granting of trade discounts was at the discretion of the defendant and only deserving customers would be entitled to enter into a written contract over trade discounts. Further that the plaintiffs never entered into an agreement for a trade discount of 5% with the defendant. The defendant was entitled to reduce the discount from 5% to 2.6 %. No binding and enforceable contract came into being. The plaintiffs have failed to prove their case on a balance of probabilities.

Accordingly it is ordered as follows:

The plaintiff's counterclaim is dismissed with costs.

Chakanyuka and Associates, plaintiffs' legal practitioners
G Machingambi Legal Practitioners, defendant's legal practitioners